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No. 601

In the

Supreme Court of the United States

October Term, 1963.

LESLIE D. STICKLER,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

On Appeal From the Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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INDEX

	Page
Motion of Appellee to Dismiss Appeal	1
Opinions Below	1
Jurisdictional Statement	2
Statutes Involved	2
Questions Presented	2
Statement of the Case—	
1 Preliminary Statement	7
2 Statement of Facts	8
Argument—	
Questions Nos. 1, 2, 4, 13, 14	10
Question No. 3	14
Questions Nos. 5 and 6	15
Questions Nos. 7, 8, 10, 12	18
Question No. 9	20
Question No. 11	21
Question No. 15	21
Question No. 16	22
Conclusion	22

CASES CITED

Hall v. Geiger-Jones Company, 242 U.S. 539, 61 L.Ed. 480	11
Morrison v. California, 291 U.S. 82	14
Shott v. Ohio (October Term, 1962, No. 877)	14

STATUTES

Sections 1707.01 through 1707.45, Revised Code of Ohio	2-18
Section 1707.01 (C) (1), Revised Code of Ohio	13
Section 1707.01 (C) (2) Revised Code of Ohio	13
Section 2945.02 Revised Code of Ohio	15
Section 2945.59 Revised Code of Ohio	20

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Now comes the State of Ohio, Appellee, by Raymond E. Shannon, Prosecuting Attorney of Hamilton County, Ohio, and Fred Cartolano, Assistant Prosecuting Attorney, of Hamilton County, Ohio, and respectfully move this Court for an order dismissing the appeal for the reason that there has been no denial of Appellant's Constitutional rights in the proceedings below.

OPINIONS BELOW

The brief of the Appellant correctly cites the opinions and judgments below.

JURISDICTIONAL STATEMENT

The appeal of Appellant from the judgment of the Supreme Court of Ohio presents the question whether the Appellant's conviction for violating the Ohio Securities Act, Sections 1707.44, paragraph (A) and 1707.44, paragraph (C), Revised Code of Ohio, was consistent with the principles of due process of law as guaranteed in the Fourteenth Amendment to the Constitution.

STATUTES INVOLVED

The statutes involved are: the Ohio Securities Act, Sections 1707.01 through 1707.45 Revised Code of Ohio, and particularly Sections 1707.01 (B), (C-1), (C-2), (E-1) and (E-2); 1707.02 and 1707.03; 1707.14 (A) and (B-2); 1707.29 and 1707.30; 1707.44 (A) and (C-1); and 1707.45; too, Sections 2945.59 and 2953.03 of the Revised Code of Ohio.

QUESTIONS PRESENTED

The Appellant raises sixteen (16) questions in this appeal:

(1) Whether Appellant's conviction under Ohio Revised Code Section 1707.01 through 1707.45, as amended, is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because of the vagueness, uncertainty, and lack of explicitness in the standards of prohibited conduct defined in the aforesaid statute both on its face and as applied to this Appellant.

(2) Whether Ohio Revised Code Section 1707.02 (G) required Appellant to determine at his peril that he was dealing in an exempt security thus imposing an arbitrary, unreasonable and oppressive standard in violation of that due process of law guaranteed by the

Fourteenth Amendment to the Constitution of the United States.

(3) Whether the Appellant was denied effective right to counsel contrary to the Sixth and Fourteenth Amendments to the United States Constitution when he was forced:

(a) to defend against an indictment thirty-two days old which was one of a series of fifteen indictments and not the lowest numbered one,

(b) to prepare for trial eight days after notice that the particular indictment would be on for trial rather than the lowest numbered one,

(c) to prepare for trial while relevant documents were in the possession of the federal authorities who had seized Appellant's records in connection with a pending federal indictment later dismissed, and

(d) to prepare on short notice while motions and rulings on motions relevant to the particular indictment were still pending.

(4) Whether Appellant's trial and conviction under Ohio Revised Code Section 1707.45, requiring him to sustain the burden of proving the non-public nature of the promissory notes executed by him, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States both on its face and as applied to this Appellant by putting on him the burden of disproving an essential element of the crime before the state made its proof, or any proof, on that element.

(5) Whether the trial court's denial of Appellant's motion for a change of venue deprived Appellant of a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States in the light of the newspaper,

radio, and television publicity accorded the incidents giving rise to the indictment and the trial and, in particular, the publicity given an incident involving the disappearance and death of a defendant in a companion case, with attendant notoriety purporting to link the Appellant to the disappearance and, by inference, the death.

(6) Whether the trial court's denial of Appellant's motion for reinterrogation of the seated jury before the trial and the whole panel after the trial began was denial of fair trial and due process contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States (a) because of a television broadcast, which occurred during the period of the impaneling, blaming Appellant for the disappearance of the defendant in a companion case and (b) because of the radio, television and newspaper coverage of the discovery of the dead body of the aforesaid defendant while Appellant's trial was in progress.

(7) Whether the trial court's ruling that the prosecution's proof was not limited by the indictment and its admission of evidence to prove that misrepresentation induced both of the note transactions charged in the indictment, and other unrelated note transactions, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States by adding an element—misrepresentation—thus changing the crimes in the indictment and putting before the jury evidence of crimes not charged.

(8) Whether the trial court's allowance of cross-examination of Appellant implying a dishonest role for him in the failure of a business venture unrelated to the indictment on trial denied Appellant a fair trial and due process of law contrary to the Sixth and Four-

teenth Amendments to the Constitution of the United States.

(9) Whether the trial court's permitting testimony, on the authority of Ohio Revised Code Section 2945.59 allowing evidence relating to transactions allegedly similar to those included in the indictment, in the face of Appellant's admission that the promissory notes covered by the indictment were made by him, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the United States Constitution and, independently, deprived Appellant of due process of law contrary to the same Fourteenth Amendment by allowing the jury, in effect, to consider evidence of crimes other than those for which the Appellant was on trial.

(10) Whether Appellant was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States when he was indicted for alleged violations of Ohio Revised Code Sections 1707.01-1707.45 and, more specifically (a) for selling securities without a license contrary to Ohio Revised Code 1707.44-(A) and (b) for selling an unregistered security contrary to Ohio Revised Code 1707.44(C) but convicted, in effect, of another crime, i.e. for false representation under Ohio Revised Code 1707.44(B) by the repeated admissions, over objection, of testimony relating to alleged misrepresentation both as to promissory notes covered by the indictment and other promissory notes not covered by the indictment.

(11) Whether the perjury of a principal fact witness for the prosecution bearing directly on the nonpublic nature of the promissory notes issued by Appellant, under the exemption in Ohio Revised Code Section 1707.02(G), deprived Appellant of a fair trial and due process of law contrary to the Sixth and Fourteenth

Amendments to the Constitution of the United States.

(12) Whether the trial court's allowing the prosecution, over objection, to argue to the jury that Appellant was an embezzler, absent any evidence whatever on that issue, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

(13) Whether the trial court's charge, in reading into the exemption for promissory notes in Ohio Revised Code Section 1707.02(G), the requirements that a "bona fide" sale must be made in "good faith in the ordinary course of legitimate business or borrowing" does not expand the requirements of Ohio Revised Code Section 1707.02(G), and, in effect, constitutes *ex post facto* criminal legislation by the trial court contrary to Article I, § 10 of the Constitution of the United States in that it introduces and charges a new crime not formulated by the statutes of Ohio and not contained in the indictment.

(14) Whether the trial court's charge to the jury on "investments" and statements on the same subject in the presence of the jury coupled with its refusal to allow the Appellant to adduce evidence on the nature of the note transactions on which the indictment was based, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

(15) Whether the trial court's refusal of Appellant's request to include the *voir dire* examination of prospective jurors in the Bill of Exceptions, which was provided Appellant because of his inability to pay, denied him appellate review solely on the basis of his ability to pay contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

(16) Whether the conviction of the Appellant was contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States because the accumulation of errors by the trial court in the conduct of the trial and the charge to the jury effectively deprived Appellant of a fair trial and due process of law.

STATEMENT OF THE CASE

1. Preliminary Statement

On May 12, 1961, the Grand Jury of Hamilton County, Ohio, returned a four (4) count indictment against the appellant, reading substantially as follows:

That at the County of Hamilton, State of Ohio, Leslie D. Stickler, on the 3rd day of January, 1961, knowingly and intentionally did unlawfully sell, cause to be sold, offered for sale, or caused to be offered for sale, to Robert Steffen, a security, to-wit: A written instrument evidencing a promise to pay money, which the said Leslie D. Stickler was not licensed to sell securities in accordance with the provisions of Ohio Revised Code, Sections 1707.01-1707.45 inclusive.

The second count, relating to the same instrument, that said Leslie D. Stickler, at Hamilton County, Ohio, on the 3rd day of January, 1961, did knowingly, unlawfully and intentionally sell, cause to be sold, offered for sale, or caused to be offered for sale, to Robert Steffen a security, to-wit: A written instrument evidencing a promise to pay money, which security was not then and there registered by description or by qualification in accordance with the provisions of Ohio Revised Code, Sections 1707.01-1707.45, inclusive.

The third and fourth counts read the same as one and two, respectively; however, they relate to a separate instrument.

Many preliminary motions were made by the Appellant, among which was a request for a Bill of Particulars, which was granted in part.

After all motions were disposed of, the trial began on June 15, 1961, before a jury. Appellant was found guilty of all four counts of the indictment.

2. Statement of Facts

The Appellant was 38 years old and had actively practiced as a lawyer since 1948. (T. 322). Robert Steffen was the owner and operator of a pizza-store franchise located in Deer Park, a suburb of Cincinnati.

Until September, 1959, neither of the two men had met (T. 54). Some time during that month, Steffen was in the law offices of another lawyer, Edgar I. Shott * * * who also was indicted and convicted of a similar offense * * *. Steffen knew Shott as a patron of his pizza store (T. 54-55). As an outcome of this acquaintance, the meeting in Shott's office resulted. The two of them discussed a certain business venture. Some fifteen minutes after this discussion, the Appellant made his appearance. Steffen had never seen the Appellant before that particular moment (T. 55).

The Appellant had some checks and a note which he gave to Shott. Shott then asked the Appellant to tell Steffen of the "operation" (T. 56).

This was the "operation": The Appellant represented himself as a contact for certain contractors and builders, located in various parts of the country; that he (Appellant) would accept money for investment with these people; they (builders and/or contractors) needed the money in order to get their construction under roof, for they were unable to obtain conventional financing; after they had proceeded to a certain point in their constructions, they were able to get the customary type of financing; for the services of the

Appellant, they were willing to pay a good return; the Appellant then would split this profit with his particular investor. To secure the arrangement, the Appellant, at the time he received the money from the particular investor, would give to him a promissory note due on a certain date in the future, plus two checks, one representing the amount invested and the other representing the profit from the investment, both checks were post-dated to fall due on the same date as the note.

Some time around Christmas, 1960, the Appellant contacted Steffen by telephone and stated he was going to Florida on the "operation", and on his return would like Steffen to invest with him directly, as the Appellant was dissatisfied with in-between-men, i.e., Shott (T. 73 & 74).

On January 3, 1961, Steffen made his first and only investment with the Appellant. Steffen gave Appellant $5,000.00 and received from him a promissory note for $6,000.00. On this same date, a promissory note issued by Shott to Steffen was due. This was in the amount of $6,000.00. By previous arrangement, Appellant, Shott and Steffen had agreed that the Shott note would be cancelled and a new one would be issued by Appellant. This was done. Therefore, at this time, Steffen received two notes from Appellant (T. 57-61), and the customary checks. These two notes were the subject matter of the indictment tried.

Why did the Appellant start this "operation" and how big was it? The trial record reflects that seven people were defrauded of $143,500.00. The entire amount manipulated by Appellant was not brought out in court, except that it amounted to over $3,000,000.00 (T. 38).

On January 6, 1961, the Appellant's scheme collapsed. Beginning on this date and continuing to the 8th, various investors were called to the Appellant's law office; they were told there were no contractors, there were no builders,

and that he, the Appellant, was "borrowing from Peter to pay Paul" (T. 72, 167-168, 183-184, 228, 243-244, 271-272).

It was during the meetings in the first part of January, 1961, that Appellant explained why he started his "operation." He stated that his activities were started in order to make good an earlier embezzlement in a collection agency formerly operated by him (T. 72, 271).

3. ARGUMENT

Questions Nos. 1, 2, 4, 13, 14

(1) Whether Appellant's conviction under Ohio Revised Code Section 1707.01 through 1707.45, as amended, is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because of the vagueness, uncertainty, and lack of explicitness in the standards of prohibited conduct defined in the aforesaid statute both on its face and as applied to this Appellant.

(2) Whether Ohio Revised Code Section 1707.02(G) required Appellant to determine at his peril that he was dealing in an exempt security thus imposing an arbitrary, unreasonable and oppressive standard in violation of that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(4) Whether Appellant's trial and conviction under Ohio Revised Code Section 1707.45, requiring him to sustain the burden of proving the non-public nature of the promissory notes executed by him, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States both on its face and as applied to this Appellant by putting on him the burden of disproving an essential element of the crime before the state made its proof, or any proof, on that element.

(13) Whether the trial court's charge, in reading into the exemption for promissory notes in Ohio Revised Code Section 1707.02(G), the requirements that a "bona fide" sale must be made in "good faith in the ordinary course of legitimate business or borrowing" does not expand the requirements of Ohio Revised Code Section 1707.02(G), and, in effect, constitutes ex post facto criminal legislation by the trial court contrary to Article I, § 10 of the Constitution of the United States in that it introduces and charges a new crime not formulated by the statutes of Ohio and not contained in the indictment.

(14) Whether the trial court's charge to the jury on "investments" and statements on the same subject in the presence of the jury coupled with its refusal to allow the Appellant to adduce evidence on the nature of the note transactions on which the indictment was based, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

The securities law of Ohio is popularly known, in this state and others, as the "Blue Sky Law" and has been in existence for over forty years. The Ohio law was held valid by the Supreme Court of the United States in *Hall* v. *Geiger-Jones Company*, 242 U.S. 539, 61 L.Ed. 480. Mr. Justice McKenna, speaking for the Court, explained the purpose of the law:

> "* * * the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed, that to use the language of a cited

> case, 'speculative schemes which have no more basis than so many feet of 'blue sky';' or as stated by counsel in another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations' * * * and we shall not pause to do more than state that the *prevention of deception is within the competency of government* * * *." (emphasis ours)

The law effectuates this purpose by (1) requiring that any person who sells securities be licensed as a dealer or salesman, unless the securities are of a certain type and character or unless the sales transaction is of a certain type and character; and (2) by requiring that prior to lawful offer or sale of securities, they must be registered with the Division of Securities unless such securities are exempt from registration or the subject matter of a transaction which is exempt from registration.

The respective statutory prohibitions pursuant to which the Appellant was convicted are Sections 1707.44(A) and 1707.44(C)(1) Revised Code of Ohio.

It may be helpful to briefly relate the Sections of the Securities Act to the theory of the State's case in the conviction of the Appellant.

The first inquiry must be to determine whether a "sale" of a "security" occurred. Section 1707.01(B), Revised Code of Ohio lays down a general definition of a "security" as "* * * any certificate or instrument which represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or credit of any person or of any public or governmental body, subdivision, or agency." Among the specific types of securities enumerated as examples by the statute is "any instrument evidencing a promise or an agreement to pay money," which is exactly the type of instrument disposed of by the Appellant.

Section 1707.01 (C)(1), Revised Code of Ohio defines "sale" as follows:

> " 'Sale' has the full meaning of "sale" as applied by or accepted in court of law or equity, and includes *every disposition* . . . (emphasis ours) . . . ., or attempt to dispose, of a security or of an interest in a security. 'Sale' also includes a contract to sell, *an exchange* . . . (emphasis ours) . . ., an attempt to sell, an option of sale, a solicitation of sale, a solicitation of an offer to buy, a subscription, or an offer to sell, directly or indirectly, by an agent, circular, pamphlet, advertisement, or otherwise."

Section 1707.01(C)(2), Revised Code of Ohio, provides:

> " 'Sell' means any act by which a sale is made."

The Appellant had the opportunity to avail to himself the benefit of one or more of the exemptions provided in the Act, and thus in effect, assert an affirmative defense. Section 1707.45, Revised Code of Ohio, provides that the accused has the burden of proof in establishing that any of the exemptions in the Securities Act are available to him.

The elements of the State's case were made when it showed the following facts:

1. that the Appellant sold a security within the meaning and contemplation of the Securities Act;
2. that the Appellant was not licensed as a security dealer or salesman (for one set of counts), and that the security was not registered with the Division of Securities (for the second set of counts);
3. that the sale transaction occurred in Hamilton County, Ohio.

When the State made out its prima facie case, the burden then shifted to the Appellant, either to controvert the elements of the State's case or to assert the benefits of

the exemptions, the latter of which are in the nature of affirmative defenses. This is far different from the situation in *Morrison* v. *California*, 291 U.S. 82.

Much of the claims of error lodged against the charge of the trial court are apparently based upon Appellant's contention that the Securities Law of Ohio is invalid. Except for certain elementary statements generally found in charges, much of the charge of the Court consisted of the reading of certain sections of the Securities Law, coupled with instructions concerning the testimony and evidence presented.

The questions raised under this section are substantially the same as those raised in *Shott* v. *Ohio*, heard by this Court in the October Term, 1962 and numbered 877; the Court refused certiorari or jurisdiction in that case.

Question No. 3

(3) Whether the Appellant was denied effective right to counsel contrary to the Sixth and Fourteenth Amendments to the United States Constitution when he was forced:

(a) to defend against an indictment thirty-two days old which was one of a series of fifteen indictments and not the lowest numbered one,

(b) to prepare for trial eight days after notice that the particular indictment would be on for trial rather than the lowest numbered one,

(c) to prepare for trial while relevant documents were in the possession of the federal authorities who had seized Appellant's records in connection with a pending federal indictment later dismissed, and

(d) to prepare on short notice while motions and rulings on motions relevant to the particular indictment were still pending.

On the matter of continuances, *Section 2945.02, Ohio Revised Code,* sets out the rule a court is to follow. It states that criminal cases shall be set for trial within thirty days of entry of a plea by the defendant; that no continuance is to be granted "* * * except upon affirmative proof in open court * * *". There was no, and still is, no showing that Appellant was prejudiced by going to trial one month after his indictment. Too, one must keep in mind this appellant was represented by not one, but three trial counsel.

As to the motion for return of certain records, the records requested, if they existed, were alleged to be in the possession of the Federal District Court. This motion, if at all valid, should have been made in that Federal Court.

Questions Nos. 5 and 6

(5) Whether the trial court's denial of Appellant's motion for a change of venue deprived Appellant of a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States in the light of the newspaper, radio, and television publicity accorded the incidents giving rise to the indictment and the trial and, in particular, the publicity given an incident involving the disappearance and death of a defendant in a companion case, with attendant notoriety purporting to link the Appellant to the disappearance and, by inference, the death.

(6) Whether the trial court's denial of Appellant's motion for reinterrogation of the seated jury before the trial and the whole panel after the trial began was denial of fair trial and due process contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States (a) because of a television broadcast, which occurred during the period of the impaneling, blaming Appellant

for the disappearance of the defendant in a companion case and (b) because of the radio, television and newspaper coverage of the discovery of the dead body of the aforesaid defendant while Appellant's trial was in progress.

As to the question of change of venue, the exercise of the right lies in the discretion of the trial court, and the voir dire examination affords the best test as to whether or not a defendant can receive a fair trial in his community. Every crime gives rise to publicity, to a greater or lesser extent, in the community of occurrence. This fact alone is no indication that a jury from that community cannot be fair, especially in a large urban area. There is no question raised here that Appellant had made an extra-judicial "confession" which was given wide publicity and therefore would tend to influence a prospective juror. In truth, Appellant always denied any wrong-doing.

Appellant makes great issue of a television broadcast during the selection of the jury. The alleged transcript of that broadcast is reproduced on page 59 of Appellant's brief.

Let us now look at the true facts as related in the examination and re-examination of the prospective jurors.

The transcript of the June 15, 1961 examination shows the following:

1. No questioned prospective juror had ever heard of Ruf or Shott.
2. Villas, a prospective juror knew a prospective witness (page 5 of June 15 jury voir dire).
3. Appellant passed for cause on all jurors examined, i.e., first twelve (page 60 of June 15 jury voir dire).

Now going to the famous "Andrew's Broadcast." On June 16, 1961, Appellant requested permission of the Court to re-examine the prospective jurors concerning that television broadcast. The request was granted by the Court

(page 5, June 16 jury voir dire). Appellant's attorney had this to say:

> MR. SMITH: "Your Honor, you can rest assured, if they didn't see it, I don't want to tell them what is in it. All I want to do is ask them if they saw it and would it influence them . . ."

Three prospective jurors saw that broadcast: Cash, who did not discuss it with the other jurors (page 7, June 16 jury voir dire) and was excused for cause (page 9, June 16 jury voir dire); Villas, excused by the Appellant (page 27, June 16 jury voir dire); the third prospective juror was Horsley. The Appellant, in his brief (page 41) states the following about him:

> "The third disavowed influence, could not be reached for cause under Ohio law * * *, and *was allowed to remain on the jury only because Appellant had exhausted his peremptory challenges.*" (emphasis ours)

The above statement is in error. After Appellant examined that juror he *passed for cause* (page 39, June 16 jury voir dire). Under Ohio law, each side has four peremptory challenges. Up to this point, Appellant had exercised only *one* of his peremptories. After examining Horsley, and passing for cause, Appellant used peremptories on: Colegrove (page 39, June 16 voir dire), Tucker (page 60, June 16 voir dire) and Davis (page 65, June 16 voir dire).

A careful reading of the entire voir dire examination indicates that any knowledge that the jury may have obtained from any form of publicity was so limited as to be non-existent.

Questions Nos. 7, 8, 10, 12

(7) Whether the trial court's ruling that the prosecution's proof was not limited by the indictment and its admission of evidence to prove that misrepresentation induced both of the note transactions charged in the indictment, and other unrelated note transactions, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States by adding an element—misrepresentation—thus changing the crimes in the indictment and putting before the jury evidence of crimes not charged.

(8) Whether the trial court's allowance of cross-examination of Appellant implying a dishonest role for him in the failure of a business venture unrelated to the indictment on trial denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

(10) Whether Appellant was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States when he was indicted for alleged violations of Ohio Revised Code Sections 1707.01-1707.45 and, more specifically (a) for selling securities without a license contrary to Ohio Revised Code 1707.44-(A) and (b) for selling an unregistered security contrary to Ohio Revised Code 1707.44(C) but convicted, in effect, of another crime, i.e. for false representation under Ohio Revised Code 1707.44(B) by the repeated admissions, over objection, of testimony relating to alleged misrepresentation both as to promissory notes covered by the indictment and other promissory notes not covered by the indictment.

(12) Whether the trial court's allowing the prosecution, over objection, to argue to the jury that Appellant was an embezzler, absent any evidence whatever on that issue, denied Appellant a fair trial and due process of law

contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

If testimony showing fraud developed in the course of the trial, it was there because the Appellant himself injected it in the very transaction which was the subject matter of the indictment. To say that the surrounding circumstances of a crime cannot be shown in court is not only naive, but perverts the whole idea of justice. It would be like a book without pages. May we refer the Court to the rhetoric of Justice McKenna, above. The very act itself in this type of crime wallows in fraud. In fact, the purpose of the law is to prevent this very thing the Appellant attempts to keep secret.

The argument by the State to the jury was based on evidence brought out during the trial. The Appellant himself characterized himself as an embezzler to his victims (T. 72, 271). The argument, as a whole, did not affect Appellant's substantial rights.

> "If every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy in the excitement of trial even the most experienced of counsel are carried away by this temptation" (*U. S. v. Chadwick*, 15 O.F.D. 615).

The Appellant, through his counsel, in his opening statement went into details of the failure of the "collection agency" (T. 34). Too, testimony of other witnesses produced evidence on this point (T. 72, 271). The fact that the Appellant in his own direct examination chose not to mention these facts would hardly preclude the State from cross-examining him on these points. The trial court held, in some instances, that such examination was relevant. If the entire record of the trial is read, can it be said he abused his discretion?

Question No. 9

(9) Whether the trial court's permitting testimony, on the authority of Ohio Revised Code Section 2945.59 allowing evidence relating to transactions allegedly similar to those included in the indictment, in the face of Appellant's admission that the promissory notes covered by the indictment were made by him, denied Appellant a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the United States Constitution and, independently, deprived Appellant of due process of law contrary to the same Fourteenth Amendment by allowing the jury, in effect, to consider evidence of crimes other than those for which the Appellant was on trial.

The testimony of "transactions allegedly similar" was properly admitted under authority of *Section 2945.59 Ohio Revised Code*:

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act is material, *any acts of the defendant which tend to show his motive or intent*, . . . (emphasis ours) . . . the absence of mistake or accident on his part, or the *defendant's scheme, plan or system in doing the act in question may be proved* . . . (emphasis ours) . . . whether they are contemporaneous with or prior or subsequent thereto, *notwithstanding that such proof may show or tend to show the commission of another crime by the defendant*" . . . (emphasis ours).

In truth, it seems somewhat belated for the Appellant to raise his objections at this time when it was his own counsel, in his opening statement, who named various "investors" other than the one named in the indictment (T. 35); too, it was his counsel, at the same time, who revealed

the amount manipulated was over $3,000,000.00 (T. 38).

The trial court, in its charge to the jury, properly instructed them as to the purpose of evidence so admitted.

Question No. 11

(11) Whether the perjury of a principal fact witness for the prosecution bearing directly on the non-public nature of the promissory notes issued by Appellant, under the exemption in Ohio Revised Code Section 1707.02(G), deprived Appellant of a fair trial and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

In light of all the evidence produced at the trial this claim must fail as not bearing on the deprivation of any of the substantial rights of the Appellant.

Question No. 15

(15) Whether the trial court's refusal of Appellant's request to include the voir dire examination of prospective jurors in the Bill of Exceptions, which was provided Appellant because of his inability to pay, denied him appellate review solely on the basis of his ability to pay contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The trial court granted to defendant a complete transcript of the testimony brought out in the trial and the charge of the Court. At no time in his appeal through the Ohio Courts did Appellant raise questions which needed a transcript of the voir dire examination of the prospective jurors. That he has obtained it now indicates, if nothing else, that he could well afford the obtaining of

it and was not a pauper. Too, a careful examination of it does not indicate any different action by the Ohio Courts. There is nothing to indicate Appellant was or could have been prejudiced by its omission.

Question No. 16

(16) Whether the conviction of the Appellant was contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States because the accumulation of errors by the trial court in the conduct of the trial and the charge to the jury effectively deprived Appellant of a fair trial and due process of law.

An examination of the record does not indicate Appellant was deprived of a fair trial and due process of law.

CONCLUSION

It is respectfully submitted that the Securities Law of Ohio is not vague, ambiguous or indefinite; and that the indictment, trial and conviction of the Appellant was fair and consistent with the due process clause of the Federal Constitution.

For these reasons, Appellee respectfully submits that the Motion To Dismiss this appeal should be allowed and the appeal dismissed.

Respectfully submitted,

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